Mohd Sari bin Datuk Okk Hj Nuar & Ors v Asia General Equipment and Supplies Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–817 OF 2008
TENGKU BAHARUDIN SHAH, RAUS SHARIF AND ABDULL HAMID EMBONG JJCA
6 APRIL 2010

Civil Procedure — Limitation of action — Breach of contract — Action filed more than ten years after expiry of agreement — Whether action time-barred — Whether party estopped from raising statutory defence of limitation due to own breaches — Object of limitation statutes

In the instant appeal, the central argument raised by the appellants ('the defendants') was that the action filed by the respondents ('the plaintiffs') on 17 October 1997 under an agreement was outside the limitation period prescribed by the Schedule to the Limitation Ordinance of Sabah (Cap 72). The defendants alleged that all the plaintiffs' rights and entitlements had been extinguished.

Held, allowing the appeal with costs here and below:

(1) The agreement period was from 1 January 1993 till 31 December 1987. The plaintiffs chose not to commence any action until almost ten years and long after the expiry of the agreement period on 31 December 1987 (see para 13).

(2) In the instant case, the cause of action was founded on contract and the breaches of the agreement. It was not a pronouncement in *Loh Hoot Yeang v Derrick Edwin David* [2006] 2 CLJ 66, that to the breaches committed by a party, that party is thus estopped from raising the statutory defence of limitation. In the instant case, even if the defendants were guilty of the alleged breaches, the limitation defence was still open to them. The breaches could not be said to have postponed the running of the limitation period. They were merely acts which gave rise to an action under a contract (see paras 20–21).

(3) The conveyance of the shares as security under the agreement amounted to a mortgage, in the sense that once the loan was repaid there should then be a reconveyance of the shares to the plaintiffs. The breaches said to have been committed by the defendants could not be said to be a clog on the equity of redemption. A clog on the equity of redemption would only arise if by a provision in the mortgage deed or

in this instance the agreement, the mortgagor is prevented from redeeming its mortgaged property. This did not arise in the instant case (see paras 22–23).

(4) The plaintiffs had slept too long on their rights having filed the action almost ten years after the cause of action arose on 1 January 1988 — at the latest. Limitation statutes are put in place with the object of discouraging plaintiffs from sleeping on their actions and 'more importantly to have a definite end to litigation'. In the instant case, the plaintiffs had not discharged their burden of proof on the limitation defence and the judge had misdirected himself by wrongly applying the doctrine of estoppel to bar the defendants from raising their rightful statutory defence. The action was stale. Public policy demanded that such an action be struck out and put to rest definitely (see paras 24–25 & 27–28).

[Bahasa Malaysia summary

Dalam rayuan ini, hujahan utama yang dibangkitkan oleh perayu-perayu ('defendan-defendan') adalah tindakan yang difailkan oleh responden-responden ('plaintif-plaintif') pada 17 Oktober 1997 di bawah suatu perjanjian adalah di luar had masa yang diperuntukkan dalam Jadual Ordinan Had Masa Sabah (Cap 72). Defendan-defendan mendakwa bahawa plaintif-plaintif telah hilang kesemua hak dan kelayakan mereka.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) Tempoh perjanjian adalah dari 1 Januari 1993 hingga 31 Disember 1987. Plaintif-plaintif tidak memulakan apa-apa tindakan hingga hampir sepuluh tahun dan setelah tamatnya tempoh perjanjian pada 30 Disember 1987 (lihat perenggan 13).

(2) Dalam kes ini, kausa tindakan adalah pada kontrak dan kemungkiran perjanjian tersebut. Bukanlah menjadi satu perisytiharan dalam kes *Loh Hoot Yeang v Derrick Edwin David* [2006] 2 CLJ 66 bahawa apabila kemungkiran dilakukan oleh satu pihak, pihak itu diestop daripada membangkitkan pembelaan statutori had masa. Dalam kes ini, walaupun defendan-defendan bersalah atas kemungkiran yang didakwa, pembelaan had masa masih lagi terbuka kepada mereka. Kemungkiran tersebut tidak boleh dikatakan menangguhkan bermulanya tempoh had masa. Kemungkiran itu hanyalah perbuatan-perbuatan yang membangkitkan kepada suatu tindakan di bawah kontrak (lihat perenggan 20–21).

(3) Pemindahakkan saham sebagai jaminan di bawah perjanjian tersebut merupakan suatu gadaian, dalam mana apabila pinjaman tersebut dibayar, harus ada perpindahakkan saham-saham tersebut kepada

plaintif-plaintif. Kemungkiran tersebut yang dikatakan telah dilakukan oleh defendan-defendan tidak boleh dikatakan sebagai menyekat ekuiti penebusan. Sekatan ke atas ekuiti penebusan hanya berbangkit jika menerusi suatu peruntukan dalam suratcara gadaian atau dalam kes ini perjanjian tersebut, penggadai janji dihalang daripada menebus harta gadaiannya. Perkara sedemikian tidak berbangkit dalam kes ini (lihat perenggan 22–23).

(4) Plaintif-plaintif telah lama mendiamkan diri atas hak-hak mereka apabila memfailkan tindakan hampir sepuluh tahun setelah kausa tindakan berbangkit pada 1 Januari 1988, selewat-lewatnya. Statut had masa digubal dengan tujuan tidak menggalakkan plaintif-plaintif melengah-lengahkan tindakan-tindakan mereka dan 'more importantly to have a definite end to litigation'. Dalam kes ini, plaintif-plaintif tidak berjaya membuktikan beban pembuktian atas pembelaan had masa dan hakim telah salah arah apabila menggunapakai doktrin estopel untuk menghalang defendan-defendan membangkitkan pembelaan statutori mereka. Tindakan tersebut sudah lapuk. Kepentingan awam menuntut bahawa tindakan tersebut dibatalkan dan ditamatkan (lihat perenggan 24–25 & 27–28).]

Notes

For cases on breach of contract, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4648–4649.

Cases referred to

Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409; [1991] 2 CLJ 871, SC (refd)

Loh Hoot Yeang v Derrick Edwin David [2006] 2 CLJ 66, CA (refd)

Ong Ah Bee v Hii Chung Siong, Robin [1364] MD 2; [1993] 1 CLJ 504, HC (refd)

Santley v Wilde [1899] 2 Ch 474, CA (refd)

Legislation referred to

Limitation Ordinance of Sabah (Cap 72) Schedule items 37, 47, 92, 95

Appeal from: Civil Suit No K22–197 of 1997 (High Court, Kota Kinabalu)

David Foong (Alex Pang & Co) for the appellants.
Joseph Lee Henn Shen (PK Lim & Co) for the respondents.

Abdull Hamid Embong JCA (delivering judgment of the court):

[1] The appellants were the defendants and the respondents, the plaintiffs in the High Court. In this judgment the parties will be referred according to their status in the court below.

[2] By an agreement in writing dated 9 February 1983 ('the said agreement'), the plaintiffs transferred by way of security, their shares ('the said shares') in Multi Industries (Sabah) Sdn Bhd (036080-T) (formerly known as Steel Furniture Centre (Sabah) Sdn Bhd) ('the company') to the first defendant and his nominees, the second and third defendants for a period of five years from 1 January 1983 to 31 December 1987 ('the loan period'), to secure the loan of RM3,000,000 to be lent to the company by the first defendant in accordance with the terms of the said agreement.

[3] At all material times, the second, third and fourth defendants are nominees of the first defendant, and had notice of the said agreement and mortgage as well as the interests of the plaintiffs in the said shares.

[4] Some important clauses were recognised by the learned trial judge, are now restated:

(a) In cl 6 of the said agreement, the first defendant executed transfer forms re-transferring the said shares back to all the plaintiffs, and those re-transfer forms were kept by a legal firm for safekeeping. It was agreed that re-transfers would take effect upon the expiry of the loan period on 31 December 1987;

(b) By cl 13 of the said agreement, the first defendant agreed and undertook not to transfer, assign, dispose or otherwise encumber the said shares and not to procure the increase or decrease in the issued share capital of the company;

(c) Pursuant to cll 7 and 11 of the said agreement, the second, third and fourth defendants, as nominees of the first defendant, were appointed sole directors of the company and had the complete control of the company during the loan period. The defendants held such office as trustees and/or agents of the plaintiffs from 31 December 1987 onwards;

(d) Under cl 2 of the said agreement, the said loan was to be disbursed by the first defendant to the company in 60 monthly installments of RM50,000 each commencing on the 1 January 1983 until 31 December 1987;

(e) By cl 3 of the said agreement, the company undertook to repay the loan on demand upon expiry of the loan period. No demand was made on the plaintiffs by the first defendant to repay the loan. The first defendant in a letter dated 13 July 1995 stated that he 'caused a foreclosure on all of the shareholdings pledged to me' for alleged failure to repay the loan;

(f) Under cl 8 the first defendant was allowed to manage and profit from the company; and

(g) Clause 12 allows the defendants to invest further capital in plant and machinery.

[5] The plaintiffs now contends that the purported foreclosure is 'a clog on the equity of redemption' and is accordingly null and void, and of no effect. Alternatively, the plaintiffs say that such foreclosure constituted a conversion by the defendants of the said shares to their own use thereby wrongfully depriving the plaintiffs of the same, whereby the plaintiffs have suffered loss and damages.

[6] The plaintiffs also say that the defendants are trustees and/or agents of the plaintiffs in respect of such receipts and expenditures, and are therefore liable to account to the plaintiffs of such receipts and expenditures. The first defendant and his nominees, the second, third and fourth defendants, by a resolution dated 18 November 1997 increased the share capital of the company to RM16,850,000 and allotted 14,000,000 new ordinary shares to their nominee, the fifth defendant. Such increment in capital and allotment of shares are in breach of cl 13 of the said agreement.

[7] The plaintiffs therefore claim for:

(a) A declaration that the alleged foreclosure is null and void, and of no effect;

(b) Redemption of the mortgage of the said shares by the transfers of the said shares back to the plaintiffs by the second and third defendants;

(c) Alternatively, an order that the plaintiffs may be at liberty to redeem the said shares upon repayment by the company of the said loan;

(d) An order that the defendants resign as directors of the company and nominate nominees of the plaintiffs to replace them, and do all such necessary acts and execute all such necessary documents for the purpose of restoring management and control of the company to the plaintiffs;

(e) An order that the defendants surrender all the books of account, land titles, properties and other assets of the company to the plaintiffs;

(f) An injunction to restrain all the defendants whether by themselves, their servants or agents or otherwise howsoever;

(i) from enforcing or taking foreclosure proceedings under the said mortgage or from selling, transferring, charging, pledging, encumbering or otherwise disposing of or dealing with 2,739,500

ordinary shares in Multi Industries (Sabah) Sdn Bhd (036080-T) now held by them; and disposing of or dealing with the said shares or any of them; and

(ii) from selling, transferring, charging, encumbering or otherwise disposing of or dealing with the company's land held under PL01628120.

(g) A declaration that the defendants hold the said shares upon trust for the plaintiffs;

(h) Alternatively, damages for conversion of the said shares upon trust for the plaintiffs;

(i) An account be taken of such receipts and expenditures from 31 December 1987 onwards;

(j) An order for the payment by the defendants to the plaintiffs of such amount found due to them on the taking of such accounts;

(k) Interest on the amount found due to the plaintiffs at such rate and for such period as this honourable court shall think fit;

(l) Costs; and

(m) Further or other relief.

[8] The defence of the defendants were discussed in the learned judge's grounds of judgment (at pp 20–28 of the record of appeal Vol 1).

[9] In essence, the defendants admitted entering into the agreement dated 9 February 1983 but averred that this was made collateral to an oral agreement and understanding between both parties, in which some of the material terms as averred by the defendants are:

(a) In consideration of the first defendant's undertaking to discharge the outstanding loan of RM6m to Sabah Bank Bhd, the plaintiffs agreed that:

(i) Within the loan period the first defendant shall take over the complete control of the company and to enjoy all the rights and benefits of a shareholder including any dividends. The first defendant shall bear any losses incurred during this period save that the company shall reimburse the first defendant for the costs of installation of machineries and extension of the factory during the loan period. This right was valued at RM3m payable by the first defendant to the company in 60 monthly installments of RM50,000 each and to be utilised towards the repayment of the outstanding loan;

(ii) The remaining RM3m required to fully settle the outstanding loan would be lent by the first defendant to the company to be disbursed to the company by way of 60 consecutive monthly installments of RM50,000 each to the Sabah Bank Bhd; and

(iii) At the end of the loan period the first defendant would surrender the control of the company to the plaintiffs. The plaintiffs on their part would then reimburse to the first defendant for the costs of the machineries and improvements to the factory invested by the first defendant during the loan period.

(b) The defendants averred that the plaintiffs knew that the disbursements of the loan by 60 monthly installments were not made to the company in accordance with the said agreement;

(c) The defendants averred that the plaintiffs knew that from June 1983 until December 1987 that the first defendant had utilised approximately RM9.66m for the company. Additionally during the loan period the first defendant had paid RM2.4m towards servicing the interest on the outstanding loan to Sabah Bank Bhd;

(d) The defendants averred that this action brought by the plaintiffs on 17 October 1997 under the agreement is outside the limitation period (ie items 37, 47, 92 and 95 of the Schedule to the Limitation Ordinance (Sabah Cap 72)) and that all their rights and entitlements to all the relief sought in the statement of claim have been extinguished by 31 December 1993;

(e) The defendants averred that the plaintiffs have abandoned their claim to their rights to seek a re-transfer of the said shares and a re-transfer of the management of the company to them. Particulars of abandonment of claim are set out in para 14 as follows:

(i) From 1985 onwards the defendants were informed that the plaintiffs were no longer keen to seek any re-transfer of the said shares in the company to them. That the plaintiffs were prepared to give up their shares so long as they could be relieved from their liabilities as guarantors for the outstanding loan to Sabah Bank Bhd;

(ii) The plaintiffs did not in 1988 nor any time until as late as May 1995 indicate that they wish to have the said shares in the company re-transferred to them. By then the first defendant had relieved the plaintiffs of most of their liabilities as guarantors for the outstanding loan to Sabah Bank Bhd worth RM4.4m.

[10] At the end of a long trial, the High Court found for and allowed all of the plaintiffs' prayers.

[11] Before us, the central argument raised in appeal by the defendants was that this action filed by the plaintiffs on 17 October 1997 under the agreement is outside the limitation period (ie items 37, 47, 92 and 95 of the Schedule to the Limitation Ordinance (Sabah Cap 72) and that all the entitlements and rights of the plaintiffs as per the reliefs sought have been extinguished by 31 December 1993 (calculating the six year limitation period from the date of expiry of the agreement ie 31 December 1987).

[12] We allowed this appeal based entirely on this limitation issue and without going into the merits of the case. We feel that this limitation defence stood independent of the merits since the cause of action by the plaintiffs is to enforce a written agreement and as such limitation applies. In fact learned counsel of the defendants did not raise the merits of the case in his arguments, except to refer to some facts pertinent to his argument on the limitation issue. Our reasons for allowing this appeal now follow.

[13] The agreement period was from 1 January 1983 till 31 December 1987. The plaintiffs chose not to commence any action until almost ten years (filing of this suit was on 17 October 1997) and long after the expiry of the agreement period, which we put as 31 December 1987.

[14] Section 3 of the Limitation Ordinance (Sabah Cap 72) in peremptory language states that 'every suit instituted after the period of limitation prescribed therefore by the Schedule shall be dismissed'. The rationale for this defence, as recognised by the learned trial judge is found in this passage from the Supreme Court case of *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409; [1991] 2 CLJ 871 which says:

> The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim *interest reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

[15] The limitation period is three years for the following causes of actions as specified in the Schedule:

Item 37 dishonest misappropriation or conversion.

Item 47 a breach of promise to do anything at a specified time.

Item 92 specific performance of a contract.

And, under item 97 the limitation period is six years for any breach of a contract in writing.

[16] The plaintiffs in their amended reply denied that the action was time barred, and averred at para 5.2(a): A

> that the said Agreement was not a mere loan agreement, but that under it the said shares were mortgaged to the 1st Defendant by way of security to secure the loan of RM3,000,000.00 to be lent to the Company by the 1st Defendant, and as such, the equity of redemption is not destroyed by the passage of time as the said shares are still available, and the redemption sum could still be paid. B

[17] It was argued by learned counsel for the plaintiffs that their case rested on the equity of redemption (ie of the shares). The defendants had then caused for the mortgaged shares to be foreclosed. And since this foreclosure of the shares occurred on 13 July 1995, when the defendants issued a letter (exh B20) notifying the plaintiffs of the foreclosure, it was only from that date (13 July 1995) that the plaintiffs lost their rights to redeem. He further contended that the foreclosure was actually a clog on the plaintiffs' equity of redemption. Time therefore runs from that date. As such the plaintiffs had not been time-barred when this action was filed on 17 October 1997. C D

[18] The second thrust of the plaintiffs' argument is that the first defendant had committed various breaches of the agreement viz, in transferring the shares away in 1986, before the expiry of the agreement, in increasing the company's debt to RM7.8m and in allotting 14 million new shares to his nominee the fifth defendant, and in the process gaining absolute control of the company. Learned counsel contended, and this was accepted by the learned trial judge, that the transgressions from those breaches amounted to a clog on the plaintiffs' equity of redemption. The learned judge also held that as a result of those breaches the defendant is now estopped from raising the limitation defence. E F

[19] With respect, we are unable to agree with the arguments of the plaintiffs and the reasoning of the learned judge in dismissing the limitation defence. G

[20] We are of the view that the cause of action is founded on contract and the breaches of the agreement. These breaches were alleged to have occurred since May 1984. The learned judge had used the doctrine of estoppel to bar the defendants from raising the limitation defence and referred to this passage from the Court of Appeal's case of *Loh Hoot Yeang v Derrick Edwin David* [2006] 2 CLJ 66 where it was said: H I

> Further, by reason of the learned judge's finding on estoppel, and that it will be unconscionable on the part of the appellant to now deny a contract of sale and purchase, likewise it will be unconscionable on his part to try and use the Limitation Act 1953 to defeat the respondent's cause of action.

With respect, we think that this passage was taken out of context to the argument on limitation. In that Court of Appeal's case, there had been a finding of fact by the trial court that the appellant 'by his acts and omission is now estopped from contending that there was no contract of sale and purchase of the said house'. The estoppel doctrine was thus used to dislodge the appellants' argument that there had been no contract.

[21] The passage quoted thus must be confined to that part of the trial judge's finding only ie that the appellant could no longer deny the existence of a contract. It is not a pronouncement that due to the breaches committed by a party, that party is thus estopped from raising the statutory defence of limitation. In fact in that case, the Court of Appeal found that limitation did not apply because based on the time calculated, the respondent was found not to be time-barred. In our view even if the defendants in this case were guilty of the breaches, the limitation defence is still open to them. The breaches cannot be said to have postponed the running of the limitation period. They are merely acts which give rise to an action under a contract.

[22] On the clog of the equity of redemption argument, we say that the conveyance of the shares as security under the agreement amounted to a mortgage, in the sense that once the loan is repaid there should then be a reconveyance of the shares to the plaintiffs. The breaches said to have been committed by the defendants cannot be said to be a clog on the equity of redemption. This is explained from this passage of the English Court of Appeal's decision in *Santley v Wilde* [1899] 2 Ch 474, which now quote:

> The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. *Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void.* (Emphasis added.)

> The right to redeem is not a personal right, but an equitable estate or interest in the property mortgaged. A 'clog' or 'fetter' is something which is inconsistent with the idea of 'security': a clog or fetter is in the nature of a repugnant condition. If I convey land in fee subject to a condition forbidding alienation, that is a repugnant condition. If I give a mortgage on a condition that I shall not redeem, that is a repugnant condition.

[23] Thus, a clog on the equity of redemption would only arise if by a provision in the mortgage deed or in this instance the agreement, the mortgagor is prevented from redeeming its mortgaged property. This does not arise in this case.

[24] The agreement between the parties ended on 31 December 1987 ie at the end of the loan period. The shares were redeemable by the plaintiffs under cl 6 of the agreement, or at the latest on that expiry date. In fact when the purported breach arise as early as 9 May 1984, when the defendants failed to release the loan, resulting in the amount owed to Sabah Bank to accumulate. The plaintiffs should have then pursued their rights to redeem. But they chose to wait and see. The cause of action arose at the latest on 1 January 1988 ie the day after the expiry of the agreement. We are of the view that the plaintiffs have slept too long on their right, having filed this action almost ten years later.

[25] Limitation statutes are put in place with the object of discouraging plaintiffs from sleeping on their actions and 'more importantly to have a definite end to litigation' (*Credit Corporation (M) Bhd*). In that case the Supreme Court also stated these underlying principles of the limitation defence:

> The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.

[26] The defendants had raised the defence of limitation. That being the situation, the burden of proving that the action was brought within the limitation period shifts to the plaintiffs as was held in *Ong Ah Bee v Hii Chung Siong, Robin* [1364] MD 2; [1993] 1 CLJ 504 where Steve Shim Lip Kiong J said:

> Now it has been held that when the defence of limitation is raised, the burden of pleading and proving that the action was brought within the limitation period shifts to the plaintiff. In *Cartledge (Widow and Administratrix of The Estate of Fred Hector Cartledge (deceased)) and others v E Jopling & Sons, Ltd* [1963] 1 All ER 341, Lord Pearce said:
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> > ... I agree that when a defendant raises the statute of limitation the initial onus is on the plaintiff to prove that his cause of action occurred within the statutory period. When, however, a plaintiff has proved an accrual of damages within the six years ... the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the cause of action accrued at an earlier date.

[27] To us, it was wrong for the plaintiffs to say that the period of limitation arose only from the date of the defendants' letter in exh B20, ie on 13 July 1995. We hold that as at that date the plaintiffs have long been statute barred. The plaintiffs were well aware that the loan had become repayable,

but had stood by idly and silently, without pursuing their rights. We find that the plaintiffs have not discharged their burden of proof on this limitation defence. We are also of the view that the learned judge had misdirected himself in not addressing this point directly but instead went around it by fallaciously applying the doctrine of estoppel to bar the defendants from raising what is their rightful statutory defence.

[28] We conclude by saying that this action is stale. Public policy demands that such an action be struck out and put to rest definitely.

[29] For these reasons, we allowed the defendants' appeal with costs here and below.

Appeal allowed with costs here and below.

Reported by Andrew Christopher Simon